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Federal Communications Commission
Office of Secretary

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Portals II, TW-A325
Washington, D.C. 20554

Re: Application of SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan WC Docket No. 03-138

Dear Ms. Dortch:

During a July 16, 2003 meeting with Commission staff, representatives of the National ALEC Association ("NALA") were asked to address whether a statement in the Commission's *Verizon-NJ 271 Order* regarding a reseller's responsibility for charges incurred by its end-users should be used as precedence in the above-referenced case. As explained herein, that statement conflicts with prior Commission policy, orders, and rules governing local exchange carrier ("LEC") disclosure of end-user billing name and address ("BNA") information. Accordingly, the Commission in this proceeding should not rely a statement that is mere *dicta* but instead should take the opportunity in this proceeding to overrule it.

In granting the 271 application of Verizon-New Jersey ("Verizon"), the Commission rejected NALA's claim that Verizon's billing practices impermissibly shift risks and costs from Verizon to resellers. After summarizing Verizon's response to NALA, the Commission expressed some agreement with Verizon and stated, without supporting authority, that "[a] reseller, like any other telecommunications carrier – including Verizon, with respect to its retail customers – is responsible for the charges incurred by its own end users." *Application by Verizon New Jersey Inc. et al for Authorization to Provide In-Region, InterLATA Services in New Jersey*, FCC 02-189 at ¶163 (June 24, 2002) (*Verizon-NJ 271 Order*). It then concluded, "Verizon's policy in this case is not unreasonable." *Id*

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The unsubstantiated statement that resellers are responsible for the charges incurred by their own end-users cannot be reconciled with the Commission's BNA policies, orders, and rules, which authorize the LECs' disclosure of BNA to third-party providers so that the providers may seek payment directly from end-users for collect and third-party calls, dial-around 1+ ("10XXX") calls, joint-use calling card calls, and other types of calls. *See, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Second Report and Order, 8 FCC Rcd 4478 (1993)(subsequent history omitted)(*BNA Second Report and Order*)(requiring LECs to provide interstate service providers with non-discriminatory access to the BNA of LEC subscribers who use a LEC calling card or authorize collect and third-party calls), *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Petitions for Reconsideration of US West Communications, Inc.*, Third Order on Reconsideration, 11 FCC Rcd 6835 (1996)(*Third BNA Reconsideration Order*)(clarifying that LECs may disclose BNA associated with 10XXX 1+ calls), and 47 C.F.R. § 64.1201.

The Commission adopted policies and rules that require or authorize BNA disclosure because, in the absence of a contractual arrangement, LECs are not obligated to reimburse third-party providers (i.e., are not responsible) for charges incurred by the LECs' end-users. The Commission appears to have presumed that it is the end-user's responsibility – not the LEC's responsibility – to pay charges associated with services provided by third party carriers. As the Commission explained in its 1996 clarification regarding dial-around 1+ calls,

The act of dialing 10XXX, like the acts of using a calling card or accepting a collect call, implies that the calling party has agreed to pay the charges imposed by that IXC for that call, and thus that the caller has agreed to BNA disclosure for purposes of receiving a bill for that call. Accordingly, we do not interpret our rules to preclude disclosure of BNA for 10XXX 1+ calls.

Third BNA Reconsideration Order at ¶ 41 (emphasis added; footnote omitted). Thus, in situations in which end-users avail themselves of services provided by a third-party provider and the provider has no billing and collection ("B&C") agreement with the end-user's LEC, the provider may obtain payment by billing the end-user directly, using BNA provided by the end-user's LEC. *See BNA Second Report and Order* at ¶ 1 (access to BNA "will enable interstate service providers to seek payment for their services directly from the LEC customer."); *see also, Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, Report and Order, 7 FCC Rcd 3528 (1992)(describing BNA at ¶ 38 as "essential" to make validation service of any practical value to IXCs that do not have a B&C agreement with the LEC).

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In adopting its BNA rules, the Commission apparently envisioned a competitive environment in which the end-user would be responsible for payment of all third-party telecommunications and information services provided by entities operating without a B&C agreement with the end-user's LEC. Both the *BNA Second Report and Order* and 47 C.F.R. § 64.1201(2), adopted therein, defined "interstate service provider" expansively to include interexchange carriers ("IXCs"), operator service providers, enhanced service providers, and "any other provider of telecommunications services." *BNA Second Report and Order* at ¶ 1, fn. 3.¹

The assertion in the *Verizon-NJ 271 Order* cannot be reconciled with Commission precedent. To the extent it purports to describe the law applicable to interstate services and providers, it is clearly inconsistent with the BNA orders discussed herein, which contemplate that end-users will be billed directly by third-party providers for charges associated with joint-use calling cards, collect and third-party calls, 10XXX calls, and other interstate calls not covered by B&C agreements. Nor can it describe the law applicable to intrastate services and providers. The fact that the Commission did not address intrastate BNA requirements and restrictions cannot be construed as substantive action, particularly in light of the jurisdictional limitations then in effect.

Ultimately, the Commission's unsubstantiated statement regarding a reseller's responsibilities is nothing more than *dicta* that the Commission should overrule at the first opportunity. *Dicta*, like *dictum*, are generally used as an abbreviated form of "obiter dictum," a Latin phrase meaning a "remark by the way." Black's Law Dictionary at 454 (Sixth Ed. 1990). *Dicta*, which is not binding in subsequent cases as legal precedent, refers to "opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself." *Id.* That the statement in the *Verizon-NJ 271 Order* regarding a reseller's responsibilities is mere *dicta* and was made without full consideration of the merits is amply demonstrated by both the lack of analysis and supporting authority and the absence of any attempt to distinguish the Commission's BNA orders and rules.

¹ The Commission subsequently amended its definition of "interstate service provider," as used with respect to BNA, to refer only to providers of *interstate* telecommunications service. *Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, Petitions for Waiver of Rules Adopted in the BNA Order*, Second Order on Reconsideration, 8 FCC Red 8798 (1993). That revision apparently reflected a recognition of the limits then in place upon its jurisdiction.

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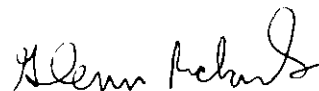
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It is Commission practice to overrule erroneous *dicta*. See e.g., *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech - Illinois*, Declaratory Ruling and Order, 10 FCC Rcd 4596, ¶ 9 (1995) ("In [a prior] order, we stated in *dicta* that we had plenary jurisdiction of numbering issues. That *dicta* is inconsistent with our analysis here and is overruled."); and *Request for Declaratory Ruling of National Association of Broadcasters Regarding Section 312(a)(7) of the Communications Act*, Memorandum Opinion and Order, 9 FCC Rcd 5778, ¶ 11 (1994) ("We agree with NAB that the *dicta* in *Ed Noble* [79 FCC 2d 903 (B/C Bur 1980)] is in conflict with the explicit statements made by the full Commission in the *1978 Policy Statement* [68 FCC 2d 1079 (1978)] . . . Therefore, to the extent that *Ed Noble* may suggest a result contrary to our determination herein, it is superseded by this ruling."). As the Commission has done previously when confronted with erroneous *dicta*, it should overrule the referenced statement from paragraph 163 of the *Verizon-NJ 271 Order*

Please do not hesitate to contact the undersigned should you have any questions.

Sincerely,



Glenn S. Richards
Susan M. Hafeli

cc J. McKee
A. Goldschmidt
R. Hanser
G. Spade